The Judgement of Solomon that went wrong: Georgia v. Russia (II) by the European Court of Human Rights

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On 21 January 2021, the European Court of Human Rights (the Court or ECtHR) delivered its long-awaited judgment in the inter-state case Georgia v. Russia (II). This case concerns the war between Georgia and Russia that took place in 2008 in South Ossetia and Abkhazia. Both of these regions are *de jure* parts of Georgia but since the collapse of the Soviet Union in 1991 they were not effectively governed by the central Georgian authorities. During the night of 7 to 8 August 2008, Georgian artillery attacked Tskhinvali (the administrative capital of South Ossetia). On 8 August 2008, Russian forces entered the territory of South Ossetia and Abkhazia. The hostilities between Russian and Georgian troops lasted until 12 August 2008 at which point a ceasefire was concluded. Since then a significant military contingent of Russian troops has been located in South Ossetia and Abkhazia. The Georgian authorities complained to the ECtHR that Russia committed human rights violations both during and after the war.

It seems that the majority of the Court aspired to deliver a 'Judgement of Solomon' and offer a shared victory to both parties. On the one hand, the Court did not establish the jurisdiction of Russia over the war zone and effectively absolved it from some obligations under the European Convention on Human Rights (ECHR) during the active phase of hostilities (between 8 and 12 August 2008), which is a significant win for the Russian authorities. On the other hand, the ECtHR found massive human rights violations on the territory controlled by Russia after the active period of hostilities, and this is undoubtedly a win for the Georgian authorities. However, in coming to this 'Judgement of Solomon', the majority of the Court had to completely reconsider the recent developments in a complex matter of jurisdiction of the Court and left so many questions unanswered that this judgment will be in the minds and hearts of the ECtHR commentators for many years to come. Finally, this judgment will have significant ramifications on pending cases in which the issue of contested jurisdiction during military hostilities is at stake.

What did the Court decide?

The Court's findings in this case should be divided into two parts: First, the ECtHR considered if the respondent state had jurisdiction over the territory where violations were taking place. Second, if the respondent state did exercise jurisdiction, whether it is responsible for any human rights violations.

Regarding the first question, the Court decided to divide the period of conflict into active hostilities (8-12 August 2008; 'active hostilities' phase) and subsequent events. One of the most significant findings of this judgment is that Russia had

no jurisdiction during the former period. It means that Russia will arguably not be responsible for many human rights violations committed by its troops in Abkhazia and South Ossetia as well as nearby Georgian regions between 8 and 12 August 2008. I said ‘many human rights violations’ but not all because the Court stated that the Russian authorities are still under the procedural obligation to investigate deaths even if they happened during hostilities (para 331). The Court also considered alleged arbitrary detentions of civilians contrary to Article 5 by Russian authorities even during the active phase of hostilities. However, the key finding that requires a detailed examination here is the lack of Russian jurisdiction during the phase of active hostilities. The Court considered two sources of jurisdiction: Effective control over the territory and ‘state agent authority or control over individuals’. The ECtHR rejected the first ground of jurisdiction by suggesting that a war zone creates a situation of chaos and it is hardly possible to talk about effective control in these circumstances (at para 126):

> “(…) in the event of military operations – including, for example, armed attacks, bombing or shelling – carried out during an international armed conflict one cannot generally speak of ‘effective control’ over an area. The very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos means that there is no control over an area.”

The ECtHR then looked into whether there was “State agent authority and control over individuals” (para. 127). The Court admitted that it had previously established jurisdiction in comparable situations but such situations were isolated and specific acts (para. 132). Conversely, the scope of confrontation here prevents the Court from establishing extraterritorial jurisdiction of the respondent state, so the argument of the judges. This line of reasoning culminates in paragraph 141 of the judgment that needs to be quoted here in full:

> “(…) having regard in particular to the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances and the fact that such situations are predominantly regulated by legal norms other than those of the Convention (specifically, international humanitarian law or the law of armed conflict), the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of ‘jurisdiction’ as established to date.”

For that reason, the Court decided that the respondent state did not execute jurisdiction over the territory of hostilities between 8 and 12 of August 2008. Concurring Judge Keller tried to explain this very limited reasoning by saying that:

> “ (…) had the Court held otherwise as to the question of jurisdiction during the active phase of hostilities, its duty would have been to assess the conduct of the respondent State in terms of international humanitarian law in order to resolve the applicant Government’s complaint under Article 2”. (Concurring Opinion of Judge Keller, para. 25)

It seems that the Court wanted to make a clear distinction between international human rights law and international humanitarian law – the distinction that this very Court has been blurring for years.

On the other hand, the ECtHR established the 'effective control' of the Russian authorities over South Ossetia, Abkhazia and the 'buffer zone' after the active part of hostilities, namely between 12 August and 10 October 2008. The Court substantiated this finding by the evidence of military, economic and political support by Russia to these regions. The ECtHR relied on the reports by the EU's Fact-Finding Mission as well as on other reports by international NGOs, official statements of the Russian authorities and various treaties concluded between Russia and Abkhazia and South Ossetia. After that the Court moved on and found various human rights violations attributable to the Russian authorities. The Court for instance identified the administrative practice of killing and torturing civilians, arbitrarily arresting them, torching and looting of houses in Georgian villages and many others.

What did the dissenting judges argue?

Unsurprisingly, the key issue of disagreement between the majority and minority of the Court was the issue of whether Russia had jurisdiction during the active phase of hostilities. The dissenting judges attacked the newly established principle of interpretation of the ECHR from various angles. Judge Grozev, for example, focused on the fact that the reasoning of the majority creates a legal vacuum in Europe. In other ways, those people that were under the protection of the Convention before 8 August 2008 and after 12 August 2008 were removed from its protection between these dates by the mere fact that they were in the war zone. For Judge Grozev, such legal vacuum in human rights protection should be excluded.

Judges Yudkivska, Pinto de Albuquerque, Wojtyczek, Lemmens and Chanturia (in different combinations) argued that the majority's reasoning is inconsistent and challenging. For them it confuses the case law, undermines the authority of the Court, weakens the protection of the Convention and runs counter to its spirit. Moreover, for some of them, the majority did not strike the right balance between international humanitarian law and international human rights law.

Why is this judgment important?

Although this judgment was probably designed as a 'win-win' judgment, it is a significant loss for the Court's role in protecting human rights in Europe in the long run. It seems to undermine the major recent developments of the case-law on the jurisdiction of the Convention in military contexts. The majority of the Court in two pages of reasoning decided that the Convention does not apply to active phases of military confrontations. This is problematic because the ECHR is not applicable when it is needed most, but also because it creates many questions of how this interpretation can be applied in practice. Judge Keller argued that the reasoning of the majority might be only appropriate in inter-state cases but would perhaps be different in cases of individual applications (Concurring Opinion of Judge Keller, at para. 13). However, it is hardly possible as a matter of principle to argue that the

Convention is not applicable to the active phase of hostilities in inter-state cases but it is in the case of individual applications.

The reasoning of the majority has left many questions unanswered. One of the most pertinent of them is what actually is meant by the active phase of hostilities. In the war between Georgia and Russia this period is relatively easy to establish but there are plenty of conflicts that do not stop with the ceasefire agreements or simply carry on without any formal acknowledgments. Does this mean that in all these cases the Convention is not going to be applicable? Is this principle only applicable to lawful acts of war and not to *de facto* military confrontations? This distinction seems artificial and unclear. This reasoning means that the outcomes of some pending cases before the Court becomes absolutely unpredictable. Perhaps the Court will have to deny the protection of the Convention to the victims of the recent conflict in Nagorno-Karabakh between Armenia and Azerbaijan. The outcomes of the cases originating from the hostilities in Eastern Ukraine are even less clear. This judgment can hardly be considered a good judgment because the latter clarifies the applicable law – rather than confusing it.

Another significant consequence of this case is that it seems that the Court is ready to give up on massive human rights violations because they are too difficult to deal with. I have already quoted paragraph 141 of the reasoning of the majority that effectively makes a statement to that effect. The dissenting judges Yudkivska, Wojtyczek and Chanturia have pointed out:

> "We are simply astonished by these arguments. In our view, the role of this Court consists precisely in dealing in priority with difficult cases characterised by 'the large number of alleged victims and contested incidents, the magnitude of the evidence produced, the difficulty in establishing the relevant circumstances'." (Partly Dissenting Opinion of Judges Yudkivska, Wojtyczeck and Chanturia, para. 9)

The Court, which was designed to be a bulwark against totalitarianism and ultimately prevent war, decided not to deal with massive human rights violations as they are too complex and demanding.

As many dissenting judges pointed out – the Court allowed the rupture of European Public Order. It is for the first time in history that the ECtHR failed to establish jurisdiction in relation to people living on a territory which would otherwise be protected by the Convention. Prior to this judgment, the Court would always find a party responsible for human rights violations if these violations happened within the Convention's territorial space. In this case, it is unlikely that Georgia can be blamed for some of the violations that happened between 8 and 12 of August 2008 and Russia is cleared by the Court from some human rights obligations during this period. Moreover, this judgment creates a very questionable incentive for states to engage in open massive wars rather than conduct isolated and specific military acts.

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